

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, DC 20554

Connect America Fund	)	WC Docket No. 10-90
	)	
A National Broadband Plan for Our Future	)	GN Docket No. 09-51
	)	
Establishing Just and Reasonable Rates for Local Exchange Carriers	)	WC Docket No. 07-135
	)	
High-Cost Universal Service Support	)	WC Docket No. 05-337
	)	
Developing a Unified Intercarrier Compensation Regime	)	CC Docket No. 01-92
	)	
Federal-State Joint Board on Universal Service	)	CC Docket No. 96-45
	)	
Lifeline and Link-Up	)	WC Docket No. 03-109
	)	
Universal Service Reform – Mobility Fund	)	WT Docket No. 10-208

**COMMENTS OF  
CTIA–THE WIRELESS ASSOCIATION®**

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To: The Commission

**COMMENTS OF  
CTIA–THE WIRELESS ASSOCIATION®**

**I. INTRODUCTION AND SUMMARY**

CTIA–The Wireless Association® (“CTIA”)<sup>1</sup> supports the petition (“Petition”) of the United States Telecom Association (“USTelecom”) for reconsideration and clarification<sup>2</sup> of the *Further Guidance Public Notice* (“*Tribal Guidance PN*”) issued by the Office of Native Affairs and Policy (“ONAP”) and the Wireless Telecommunications and Wireline Competition Bureaus

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<sup>1</sup> CTIA – The Wireless Association® is the international organization of the wireless communications industry for both wireless carriers and manufacturers. Membership in the organization covers Commercial Mobile Radio Service (“CMRS”) providers and manufacturers, including cellular, Advanced Wireless Service, 700 MHz, broadband PCS, and ESMR, as well as providers and manufacturers of wireless data services and products.

<sup>2</sup> Petition for Reconsideration and Clarification of the United States Telecom Association, WC Docket Nos. 10-90 *et al.* (filed Aug. 20, 2012) (“Petition”).

(the “Bureaus”).<sup>3</sup> The Petition raises substantive issues that must be considered carefully by ONAP and the Bureaus, including noncompliance with mandatory procedures of the Administrative Procedure Act (“APA”)<sup>4</sup> and Paperwork Reduction Act (“PRA”).<sup>5</sup> At minimum, the Commission should reconsider the *Tribal Guidance PN* and clarify that it is not binding on ETCs and cannot form the basis for USAC audit review.

CTIA strongly supports the extension of communications and broadband service to Tribal lands, which are among the most seriously underserved in the nation. Indeed, wireless broadband is often the most economical type of facility to deploy in areas such as Tribal lands that are characterized by widely dispersed populations. Further, wireless carriers have a history of positive engagement with Native American Tribes and have played a pivotal role in extending telephone service to extensive areas of Tribal Lands that previously were unserved.<sup>6</sup>

Though motivated by good intentions, the *Tribal Guidance PN* would impose such overwhelming burdens on providers that it actually would create disincentives for eligible telecommunications carriers (“ETCs”) to serve Tribal lands at all, contrary to the goals of the Commission and mobile wireless providers alike.

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<sup>3</sup> *Office of Native Affairs and Policy, Wireless Telecommunications Bureau, and Wireline Competition Bureau Issue Further Guidance on Tribal Government Engagement Obligation Provisions of the Connect America Fund*, WC Docket Nos. 10-90 *et al.*, Public Notice, 27 FCC Rcd 8176 (2012) (“*Tribal Guidance PN*”). See also *Office of Native Affairs and Policy, Wireless Telecommunications Bureau, and Wireline Competition Bureau Seek Comment on the United States Telecom Association Petition for Reconsideration and Clarification of the Further Guidance Regarding the Tribal Government Engagement Obligation Provisions of the Connect America Fund*, WC Docket Nos. 10-90 *et al.*, Public Notice, DA 12-1405 (rel. Aug. 27, 2012).

<sup>4</sup> See 5 U.S.C. § 551 *et seq.*

<sup>5</sup> See 44 U.S.C. § 3501 *et seq.*

<sup>6</sup> See, e.g., Letter from David A. LaFuria, counsel to Smith Bagley, Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-337 (filed Oct. 29, 2010), att. at 3.

As discussed below, CTIA agrees that ONAP and the Bureaus should reconsider the *Tribal Guidance PN* because of the enormous costs and other burdens it would impose on ETCs and the fatal procedural deficiencies under the APA and PRA. In addition, CTIA also agrees that ONAP and the Bureaus should clarify that the *Tribal Guidance PN* does not apply to ETCs that do not receive Tribal USF support, including ETCs whose USF support is being phased out.

## **II. THE *TRIBAL GUIDANCE PN* WOULD IMPOSE OVERWHELMING BURDENS ON ETCs**

As USTelecom points out, the costs of complying with the *Tribal Guidance PN* would be enormous.<sup>7</sup> The public notice sets out an expansive list of issues that ETCs are expected to address with Tribes, without sufficient acknowledgement that the scope and topics for engagement should be driven in the first instances by the specific facts related to the Tribe and the ETC. The *Tribal Guidance PN* increases the burdens of engagement by mandating that the meetings be led by senior executives in face-to-face meetings with Tribes, except “where extreme weather conditions and/or extreme remoteness are present.”<sup>8</sup> Although engagement by senior executives will make sense in some instances, other ETC personnel, including those involved in network design and marketing, often will be closest to the information of greatest interest to Tribes.<sup>9</sup> Moreover, mandating that engagement be led by senior executives would significantly increase the costs of engagement. Further, requiring that senior executives meet face-to-face with each of the various Tribal communities would entail significant travel expenditures.

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<sup>7</sup> See Petition at 11–14.

<sup>8</sup> See *Tribal Guidance PN*, 27 FCC Rcd at 8179 ¶¶ 9–10 & n.17.

<sup>9</sup> See Petition at 13.

Given the number of federally recognized Tribes,<sup>10</sup> carriers operating in multiple states would have to devote overwhelming numbers of senior executive hours to travel to and meet with Tribal officials. These costs would be burdensome for both large and small carriers. Larger carriers would have to interface with a potentially enormous number of Tribes, literally hundreds for national carriers, and might have to dedicate one or more executives solely to Tribal engagement in order to comply with the PN. The requirements would also be difficult to manage for smaller carriers because of these carriers' typically leaner staffing structures and smaller executive ranks.

The overly rigid standards set out in the *Tribal Guidance PN* also could make culturally sensitive marketing cost-prohibitive for ETCs. ONAP and the Bureaus appear to contemplate advertising specific to each Tribe, which may make sense in some cases but not in others.<sup>11</sup> In addition, this “may” include “locating a retail presence within a Tribal community and employing members of that community.”<sup>12</sup> This would require economic feasibility studies for opening retail locations in each Tribal community – an extremely burdensome proposition – even before the substantial cost of a brick-and-mortar store is considered.

As USTelecom points out, the *Tribal Guidance PN* also would impose other costs, including the costs of preparing presentations and materials for meetings with Tribal officials.<sup>13</sup>

The presentations contemplated by the *Tribal Guidance PN* are detailed and must touch on a

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<sup>10</sup> The *Tribal Guidance PN* indicates that there currently are approximately 566 federally recognized American Indian Tribes and Alaska Native Villages, as well as Hawaiian Home Lands. See *Tribal Guidance PN*, 27 FCC Rcd at 8182 ¶ 24.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 8182–83 ¶ 25.

<sup>13</sup> See Petition at 12.

variety of topics, including deployment priorities, the process used to identify those priorities, initial deployment plans, services currently deployed on Tribal lands, relevant rights of way and other permitting and review processes, and business and licensing requirements.<sup>14</sup> The *Tribal Guidance PN* states that presentations also should include supporting documentation, including documents related to “any and all” permitting and review processes with which an ETC currently complies and documents demonstrating compliance with any relevant Tribal business and licensing requirements.<sup>15</sup> Given the large number of federally recognized Tribal lands, preparing these presentations and assembling the supporting documentation for each Tribe served would entail enormous costs.

### **III. THE *TRIBAL GUIDANCE PN* IS NOT A VALID SUBSTANTIVE RULE**

#### **A. The *Tribal Guidance PN* Was Not Subject to Notice and Comment as Required by the APA**

Before binding regulations can be adopted, the APA requires that an agency provide notice sufficient to “fairly apprise interested persons” of the nature of the proposed obligations and an opportunity to comment on them.<sup>16</sup> As USTelecom observes,<sup>17</sup> ONAP and the Bureaus

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<sup>14</sup> See *Tribal Guidance PN*, 27 FCC Rcd at 8181 ¶¶ 19, 8183 ¶ 27, 8184 ¶ 29.

<sup>15</sup> *Id.* at 8183 ¶ 27.

<sup>16</sup> See *Nuvio Corp. v. FCC*, 473 F.3d 302, 309–10 (D.C. Cir. 2006) (“[T]he notice [required by the APA for proposed rules] must be sufficient to fairly apprise interested parties of the issues involved . . .” (quoting *Action for Children’s Television v. FCC*, 564 F.2d 458, 470 (D.C. Cir. 1977) (internal quotation marks omitted))); *MCI Telecommunications Corp. v. FCC*, 57 F.3d 1136, 1140–41 (D.C. Cir. 1995) (“The APA requires the Commission to provide notice of a proposed rulemaking ‘adequate to afford interested parties a reasonable opportunity to participate in the rulemaking process.’” (quoting *Florida Power & Light Co. v. United States*, 846 F.2d 765, 771 (D.C. Cir. 1988))).

<sup>17</sup> See Petition at 6–9.

never provided notice of nor an opportunity to comment on the scope and type of engagement activities set forth in the *Tribal Guidance PN*, which are extensive.

In addition, the courts have held that the Commission cannot bypass the formal rulemaking process by imposing substantive obligations under the guise of a policy statement.<sup>18</sup> Thus, regardless of the name given the document, the *Tribal Guidance PN* must be adopted in accordance with the notice-and-comment procedures of the APA if it contains mandatory obligations.

#### **B. ONAP and the Bureaus Failed to Comply With the PRA**

As USTelecom points out, the PRA governs agencies' collection of information, and requires that a federal agency provide prior notice of and seek public comment on a proposed collection and obtain the approval of the Office of Management and Budget ("OMB") based on a showing of need.<sup>19</sup>

Under the PRA and its implementing rules, the term "collection of information" is defined broadly such that the engagement with the Tribes mandated by the PN is subject itself to PRA requirements, and not just the requirement that ETCs report to the Commission on their engagement activities. Specifically, the *Tribal Guidance PN* sets out a set of "identical reporting, recordkeeping, or disclosure requirements" and a "plan ... calling for the collection or disclosure of information" to Tribes, including plans for network deployment, marketing, and

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<sup>18</sup> See *Appalachian Power Co. v. EPA*, 208 F.3d 1015 (D.C. Cir. 2000) (setting aside an EPA guidance document after finding that the document was in fact a binding legislative rule adopted without the requisite notice and comment); See *Community Nutrition Institute v. Young*, 818 F.2d 943, 945–49 (D.C. Cir. 1987) (holding invalid benchmarks that were adopted by the FDA and characterized as "policy statements" because the agency gave them present, binding effect but issued them without notice and comment).

<sup>19</sup> Petition at 14–16. See 44 U.S.C. § 3506(c).

other topics.<sup>20</sup> Thus, the Commission may not require ETCs to comply with *either* the engagement steps *or* the reporting requirements in the *Tribal Guidance PN* without an OMB control number demonstrating that the PRA process has been followed.<sup>21</sup> ONAP and the Bureaus failed to follow the procedures required by the PRA to obtain OMB approval of the information collections contained in the *Tribal Guidance PN*, and OMB has never approved the extensive information collections contained in the document. Thus, ETCs cannot be required to follow the engagement steps discussed in the public notice or report to the Commission on them until OMB has issued its approval under the PRA. The Commission should reconsider the public notice or, at minimum, clarify that it is not binding on ETCs and cannot form the basis for USAC audit review.

#### **IV. THE *TRIBAL GUIDANCE PN* FAILED TO CONSIDER OR BALANCE THE BURDENS IT WOULD IMPOSE IN VIOLATION OF EXECUTIVE ORDER**

The Commission has committed to follow the President’s Executive Order requiring agencies to “adopt a regulation only upon a reasoned determination that its benefits justify its costs.”<sup>22</sup> Thus, before issuing the *Tribal Guidance PN*, the ONAP and the Bureaus had an

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<sup>20</sup> A “collection of information” that is subject to the PRA includes “the obtaining, causing to be obtained, soliciting, or requiring the disclosure to ... third parties ... of information by or for an agency by means of identical questions posed to, or identical reporting, recordkeeping, or disclosure requirements imposed on, ten or more persons, whether such collection of information is mandatory, voluntary, or required to obtain or retain a benefit. ‘Collection of information’ includes any requirement or request for persons to obtain, maintain, retain, report, or publicly disclose information. As used in this Part, ‘collection of information’ refers to the act of collecting or disclosing information, to the information to be collected or disclosed, to a plan and/or an instrument calling for the collection or disclosure of information, or any of these, as appropriate.” 5 C.F.R. § 1320.3(c). *See also* 44 U.S.C. § 3502(3)(A).

<sup>21</sup> *See id.* 44 U.S.C. § 3512(a)(1).

<sup>22</sup> *See* Exec. Order No. 13,563, Improving Regulation and Regulatory Review, 76 Fed. Reg. 3821, 3821 (Jan. 21, 2011); *see also* Exec. Order No. 13,579, Regulation and Independent Regulatory Agencies, 76 Fed. Reg. 41585 (July 14, 2011). *See also, e.g.*, Julius Genachowski,

obligation to consider whether the costs associated with the requirements contained in the document would be outweighed, or justified, by their associated benefits. This standard was not met; indeed, ONAP and the Bureaus made no effort to determine either the significant costs that the guidance would impose or the benefits it would produce, nor to balance them against one another. Significantly, ONAP and the Bureaus failed to consider the extent to which extensive engagement obligations would deter ETCs from serving Tribal lands in order to avoid the significant and unfunded costs engagement would entail.

**V. TRIBAL ENGAGEMENT OBLIGATIONS SHOULD NOT APPLY TO ETCs THAT DO NOT RECEIVE TRIBAL SUPPORT, INCLUDING ETCs WHOSE SUPPORT IS BEING PHASED OUT**

As USTelecom observes,<sup>23</sup> Tribal engagement commitments or activities are impractical for ETCs at this juncture. ETCs receiving only legacy support that is being phased out are unlikely to be making new investments in Tribal lands. At minimum, any such investments would occur only in the near term, and would not justify the significant engagement efforts and long-range deployment analysis contemplated in the PN. Thus, there is no reason to require legacy ETCs to engage in expensive Tribal engagement.

Although a tailored Tribal engagement requirement might be appropriate for ETCs that receive Tribal Mobility Fund support, as USTelecom notes, it would be a waste of time for ETCs to meet with Tribal communities to discuss Tribal deployment plans at this instant.<sup>24</sup> No support recipients or amounts (Tribal or otherwise) have been determined yet for the Mobility Fund

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Chairman, FCC, “Statement of FCC Chairman Julius Genachowski on the Executive Order on Regulatory Reform and Independent Agencies” (July 11, 2011).

<sup>23</sup> See Petition at 3–4 & n.8.

<sup>24</sup> See *id.* at 4.

Phase I or II. Thus, it is unclear even which ETCs should comply with the requirements as a result of these funds.

### **CONCLUSION**

For the reasons discussed herein and as stated in the Petition, the Commission should reconsider the *Tribal Guidance PN* and clarify that it is not binding on ETCs and cannot form the basis for USAC audit review.

Respectfully submitted,

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